

2011 WL 5410836 (Ind.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Indiana.
Allen County

Wanda J. MANNING and Kathy R. Scott, Plaintiffs,

v.

Patrice A. TUCKER, Defendant.

No. 02D01-0905-CT-196.
March 8, 2011.

Plaintiffs' Memorandum in Support of Motion to Correct Errors

Geisleman & Brown, LLP, [Dennis H. Geisleman](#) (8254-02), 919 South Harrison Street, Harrison Place, Suite 100, Fort Wayne, IN 46802, (260) 420-2001, Attorney for Plaintiffs.

This Memorandum is filed contemporaneously with plaintiffs' Motion to Correct Errors pursuant to [Indiana Trial Rule 59](#). Because the jury's respective verdicts for Wanda Manning and Kathy Scott fell below the uncontroverted evidence of damages sustained by each plaintiff, plaintiffs assert that the jury's verdict is inadequate as a matter of law and that prejudicial or harmful error has been committed by the jury in reaching those respective verdicts. As such, plaintiffs' Motion to Correct Errors should be granted.

FACTS

Plaintiffs' counsel would incorporate by reference the medical records, medical expense and treatment summaries and wage loss documentation admitted at trial and pre-trial numbered as Plaintiffs' Trial Exhibits 1 through 21. In addition to such medical evidence, plaintiffs would summarize the following facts and proposed findings for the Court as follows:

1. Kathy Scott described an impact with the shopping cart she was pushing after it was struck by the vehicle driven by defendant, Patrice Tucker, through a pedestrian zone outside of Sam's Club. In hanging onto the cart, she suffered an awkward twisting motion that, at a minimum, aggravated an asymptomatic degenerative low back condition. Imaging documented a tear in the annulus and disk fragment at L4-5 (Dr. Daniel Wilcox, Fort Wayne Orthopaedics, Exhibit 19, p. 4).
2. Kathy Scott described the medical treatment she received at Lutheran Hospital, as directed by Karen Evans, M.D., at Indiana Physical Therapy, Fort Wayne Orthopaedics, and Mallers & Swoverland Orthopaedic Physical Therapy. None of Dr. Evans' medical testimony or the records contained in Exhibits 15 through 21 were controverted by any defense testimony.
3. Kathy Scott described improvement of her pain after her second session of physical therapy, but described ongoing difficulties with standing and physical activity. These limitations were confirmed independently by the credible testimony of her husband, James Scott, and by a fellow physical education middle school teacher, Jeff Lee.
4. Wanda Manning similarly described collision injuries, which were captured on a video tape at Sam's Club. Her injuries were primarily to her right lower leg and her left hip/buttock.
5. Dr. Karen Evans described the slow improvement of these two injuries. Additionally, physical therapist, Nathan Notter, described the exercises and therapy given to Wanda Manning, along with her determination and cooperation with therapy tasks.

Objective evidence of loss of range of motion, swelling, tenderness with palpation are documented both by Dr. Evans' office and physical therapist Notter.

6. Wanda Manning described her physically demanding job as a hair stylist that required her to be on her feet. She was unable to do that for a period of two months, although she had tried to return earlier to work, unsuccessfully. For a period of time, she needed crutches and, thereafter, wore an air cast. Evidence of her earnings in the two years prior to this injury established a loss of income that was uncontroverted by any opposing defense evidence.

7. The owner of her hair salon, who is also her boyfriend, Virgil Alexander, presented credible testimony as to the nature and extent of Wanda Manning's injuries that limited her and required assistance for most adult daily activities, such as meal preparation and driving to appointments, which services were provided by Mr. Alexander and Wanda's **elderly** parents.

8. Both plaintiffs Kathy Scott and Wanda Manning were credible, consistent, and believable witnesses who described injury and pain and limitation that itself exceeded the value of the other calculable losses, such as lost time, earnings, and medical expense.

9. Based upon the foregoing facts and plaintiffs' undisputed medical exhibits and evidence, the Court, acting as a "thirteenth juror," is requested to find that the jury verdict is "against the weight of the evidence" and to adopt findings of fact, in whatever format, consistent with the evidence and the summary of facts presented above.

DISCUSSION

Trial Rule 59 Standards

Under Indiana law, a Trial Court has broad discretion to correct error. [Russell v. Neumann-Steadman](#), 759 N.E.2d 234, 236 (Ind. Ct. App. 2001). [Indiana Trial Rule 59](#) specifically states that the Court, if it determines that prejudicial or harmful error has been committed, shall take action to cure such error. Specifically:

The Court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors:

(5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or a grant a new trial subject to additur or remittiture.

[Ind. Trial Rule 59\(J\)\(5\)](#).

This remedy is only available when the evidence is insufficient to support the verdict as a matter of law. [Childress v. Buckler](#), 779 N.E.2d 546, 550 (Ind. Ct. App. 2002), citing [Russell](#), 759 N.E.2d at 237. Under Indiana law, a Trial Court may only reverse a jury's award determination "when it is apparent from a review of the evidence that the amount of damages awarded by the jury is so small or so great as to clearly indicate that the jury was motivated by prejudice, passion, partiality, corruption, or that it considered an improper element." [Dee v. Becker](#), 636 N.E.2d 176, 177 (Ind. Ct. App. 1994).

The Trial Court's duty, however, has been elaborated upon by this State's Supreme Court which previously explained that:

The trial judge is more than a mere umpire; his duties extend beyond the bounds of confining evidence to the issues and instructing the jury on the law of the case; it was his duty to hear the case along with the jury; he had the opportunity to see and know the jury; he had the duty to observe the witnesses and note the level of their intelligence and wisdom together with their independence or lack of it, their prejudice or lack of it concerning matters about which they testified, and to note their bias or prejudice, their interest or lack of interest. In short it was his duty to keep his eyes and ears open to what was going on during the trial so that

when confronted with a motion for a new trial, he could pass upon the purely legal questions involved in the case, as well as determine the weight and sufficiency of the evidence to sustain the verdict.

Memorial Hosp. of South Bend v. Scott, 300 N.E.2d 50, 53-54 (Ind. 1973) (quoting *Bailey v. Kain*, 192 N.E.2d 486, 488-89 (Ind.Ct.App. 1963), emphasis from *Scott*).

Furthermore, [Indiana Trial Rule 59\(J\)](#) permits the Trial Court broad discretion in remedying an inadequate verdict including granting a new trial.

Jury Decision and Error

With respect to plaintiff Wanda Manning, the jury heard uncontroverted evidence that her medical expenses were paid at a total cost of \$12,045.69. The reasonableness and necessity of the care was not challenged by the defendant. The jury also heard credible evidence that Wanda Manning lost earnings as a direct result of her injuries, which totaled \$7,397.00. Finally, the jury heard specific evidence as to pain and suffering incurred by Wanda Manning.

The only evidence as to the amount of reasonable and necessary medical expense for Wanda Manning's care indicated expense in the total sum of \$12,045.69. Combined with the lost earnings, as indicated above, special damages alone totaled \$19,442.69. In contrast, the jury awarded to Wanda Manning damages totaling \$16,545.69, less than the uncontroverted evidence of out-of-pocket expense. The verdict of Wanda Manning is against the weight of all of the evidence in that the jury's verdict does not even account for all of the out-of-pocket special damages, let alone the uncontroverted credible evidence as to pain, suffering, and other limitations incurred by Wanda Manning as a result of the defendant's negligence. The jury's verdict with respect to Wanda Manning is clearly against the weight of all of the evidence.

As to Kathy Scott, the jury heard uncontroverted evidence that her medical expenses were charged at a total cost of \$7,426.86 and paid at a total cost of \$4,004.06. The reasonableness and necessity of the care was not challenged by the defendant. The jury heard specific credible evidence as to pain and suffering incurred by Kathy Scott, as well as her past and ongoing physical limitations. The verdict of Kathy Scott is against the weight of all of the evidence in that the jury's verdict does not account for the reasonable value of her out-of-pocket special damages, in addition to her pain, suffering, and past and ongoing physical limitations incurred by Kathy Scott for which uncontroverted evidence was introduced at trial. The jury's verdict with respect to Kathy Scott is against the weight of all of the evidence.

Analysis and Argument

Pursuant to [Indiana Trial Rule 59\(J\)](#), if this Court determines that prejudicial or harmful error has been committed, such action shall be taken as will cure the error. In this case, plaintiffs assert that the error may be cured pursuant to [Trial Rule 59\(J\)\(5\)](#) in the case of excessive or, as in this case, inadequate damages the Court may enter final judgment on the evidence for the amount of the proper damages, may grant a new trial, or may grant a new trial subject to the additur. The Court's ability to render such relief is "without limitation."

Indiana law follows the general tort principle that all damages directly attributable to the wrong are recoverable by the victim. [Childress](#), 779 N.E.2d at 550. In the case of the plaintiff Wanda Manning, the jury's verdict does not even allow her to recover all of her out-of-pocket damages which were established by uncontroverted evidence at trial. With the fault of the defendant not in dispute and with uncontroverted evidence of medical special damages totaling \$12,045.69 and lost earnings totaling \$7,397.00, it is apparent that the jury's award of damages for the plaintiff Wanda Manning of \$16,545.69 is inadequate as a matter of law.

Uncontroverted and credible evidence was also submitted at trial as to the pain and suffering and various limitations suffered by Wanda Manning in the months following this incident. Each of these elements were ignored by the jury's award and may properly be considered by this Court as part of the relief requested, i.e. a new trial.

With respect to the plaintiff Kathy Scott, while the jury's award of \$5,504.06 does barely account for the amount of the medical expense which was actually paid, that total does not necessarily cover the reasonable and necessary cost of the medical expense as it ignores the conflicting evidence presented at trial as to the charged amount for such care. More significantly, the plaintiff Kathy Scott asserts that the jury's verdict completely **neglected** to award her for pain and suffering and for the continued physical limitations she has as a result of the injuries she sustained. As such, and similar to the claims of the plaintiff Wanda Manning above, Kathy Scott also asserts that the jury's award for her claim is inadequate as a matter of law.

In the *Childress* case, a similar set of facts was presented to the Court as with the case above. In that case, there was uncontroverted evidence of medical expense plus lost earnings which ranged between \$4,149 and \$4,649. In contrast, the jury awarded the plaintiff \$1,639 and the Court of Appeals upheld the Trial Court's decision to correct error via additur.

In the present case, as in *Childress*, a key component of granting this Motion to Correct Errors is the fact that the evidence submitted in favor of the respective plaintiffs' claims was uncontroverted and credible. While that was true in *Childress* as to the amount of medical expense and lost earnings, that is also true presently as to each of those elements, in addition to uncontroverted evidence as to pain, suffering, and physical limitations for each plaintiff. This case was not a "battle of the experts" which might have allowed for the jury to determine the case based on variable or conflicting evidence as to the nature, extent, or source of the injuries complained of. In that setting, certainly, the jury would be in the best position to determine the amount of damages. *Pendleton v. Aguilar*, 827 N.E.2d 614 (Ind. Ct. App. 2005). However, that was not the case with regard to Wanda Manning or Kathy Scott's claims as the evidence in support of each was credible and uncontroverted.

CONCLUSION

For each and all of the foregoing reasons, as well as those set forth in the Motion to Correct Errors filed contemporaneously herewith, the plaintiffs each respectively assert that the jury's verdict as to each was inadequate as a matter of law. Plaintiff Wanda Manning specifically seeks that a new trial be granted. Plaintiff Kathy Scott seeks that a new trial be granted. Plaintiffs further request all other relief just and proper in the premises.

Respectfully submitted,

GEISLEMAN & BROWN, LLP

<<signature>>

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